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In The

Supreme Court of the United States

October Term, 1986

VICTOR KHUBANI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

With respect to an entrapment defense in a case involving related criminal acts, is the holding of the Second Circuit that a defendant's predisposition may be determined subsequent to the time of an initial entrapment contrary to this Court's holding in *Sherman v. United States,* 356 U.S. 369 (1958)?

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No.

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VICTOR KHUBANI,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, The Chief Justice of the United States and Associate Justices of the United States Supreme Court

The petitioner, Victor Khubani, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment and opinion at Number 85-1408.

OPINION BELOW

The opinion and judgment of the Court of Appeals for the Second Circuit, reported at 791 F.2d 260 (2d Cir. 1986), is reproduced at 1a.[1]

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit affirming petitioner's conviction was filed on May 27, 1986.

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner was charged with two counts of bribery of an agent of the Internal Revenue Service ("IRS") in violation of 18 U.S.C. § 201(b). The counts were based on two bribes given by petitioner approximately three weeks apart to the same IRS agent. The first bribe, for $400 and some personal electronic equipment, was given on October 21, 1983; the second bribe, for $700, was given on November 14, 1983. The sole defense as to both counts was entrapment. A charge of conspiracy to bribe a public official was dismissed by the court at the close of the government's case.

The jury in its first day of deliberations returned a verdict of not guilty with respect to the first bribe. On the second day of deliberations, the jury convicted the petitioner on the second bribe.

Petitioner was sentenced on his conviction to a term of imprisonment of two years, with all except four months suspended,

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1. References are to pages of the appendix annexed to the petition.

these four months to be served in a half-way house.[2] Petitioner was also fined $20,000 and ordered to perform 250 hours of community service during a one-year term of probation to commence following the completion of his period of confinement. The execution of the sentence has been stayed and petitioner is presently free on bail pending determination of this petition.

A co-defendant, Ranju Bhawnani, was, on a defense of entrapment, acquitted of two substantive counts of bribery.

According to the government's testimony, in May 1983, Richard Warren, an IRS field auditor, was assigned to conduct an audit of the Tandoor Restaurant, an Indian restaurant in Manhattan. On October 11, 1983, Warren notified petitioner by telephone that the restaurant audit was being expanded to include the personal returns of its owners — petitioner and Bhawnani. Warren asked petitioner to arrange a meeting between himself and petitioner's accountant.

Thereafter, Warren met with petitioner on three separate occasions at the offices of Azad International, petitioner's company, an importer of small electronic goods. Warren testified that on October 18, 1983, petitioner agreed to give him radios and similar electronic equipment if he would "forget about" the personal audit. At that time, Warren stated he would return later for the items. In a recorded telephone conversation following this meeting, Warren refused to accept the merchandise and asked petitioner if there was "anything else" he could offer.

At a subsequent meeting on October 21, which Warren recorded with a concealed recording device, Warren again refused

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2. The Second Circuit opinion incorrectly stated that petitioner "was sentenced to two years imprisonment, with all but four months to be served in a half-way house." 791 F.2d at 261 (2a). Counsel has notified the clerk of that court of this error.

to accept the proffered merchandise and demanded something else. Despite petitioner's pleas for a three-month postponement of the audit until after the busy Christmas season, Warren insisted that the audit would be held the next month. After a lengthy conversation, petitioner asked what he should do and was told by Warren "It's up to you." Petitioner initially offered Warren $250 but, apparently responding to Warren's demand for more money, eventually gave Warren $400 and some minor electronic equipment. In return, Warren stated he would not audit petitioner's personal returns.

On November 14, Warren again met with petitioner and again recorded the meeting with a concealed recording device. At this meeting, petitioner asked Warren to report that an audit had been performed and that the personal returns were accurately filed. Petitioner also asked Warren to dispense with the audits of both Bhawnani and the restaurant. Although petitioner argued that these requests should be covered by his prior payment, Warren insisted that an additional payment was necessary. Eventually petitioner gave Warren an additional payment of $700.

Petitioner's defense to both bribery charges was that he was entrapped into making the payments to Warren. Petitioner testified at trial that Warren utilized intimidation, threats and coercion to induce and compel the payment of the bribes petitioner gave him. Petitioner sought to establish that Warren induced the bribes through his refusal to grant the reasonable request for postponement of the audit and his continual threats of a long audit to investigate unspecified allegations.[3] Petitioner testified that he had explained to Warren that the postponement was necessary because his electronic gift item business was entering its busiest season. Warren repeatedly answered this request by

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3. During cross-examination, Warren admitted that his conduct in relation to the co-defendant Bhawnani had, in fact, been improper.

asking what petitioner could do for him and what benefit he would receive from a postponement. Faced with these responses, eventually petitioner agreed to give Warren a bribe. Thus, the sole contested issue at trial was whether the actions of the IRS auditor induced a person not otherwise predisposed to commit a crime to pay a bribe to a government official.

In its instructions to the jury on the issue of entrapment, the district court refused to give an instruction requested by petitioner (Request to Charge Number 2, 14a) which stated, in substance, that if entrapment was found as to the October 21, 1983 bribe, then the government must prove beyond a reasonable doubt that the November 14 bribe was not the result of the first entrapment.

Following its return of the verdict of not guilty with respect to the first bribe, the jury requested further instruction on whether the defense of entrapment was available if petitioner had a predisposition on the date of the second bribe. Since the sole defense to either count was entrapment, the not guilty verdict with respect to the first bribe necessarily constituted a finding by the jury that petitioner lacked the predisposition to commit that offense. Petitioner requested that the jury be instructed that predisposition refers to a defendant's state of mind prior to the time he first interacted with the government agent, and not the date of the second bribe. The court refused the instruction and, instead, instructed the jury that if, upon evaluation of all the evidence, it found that the petitioner had on November 14 the predisposition to commit the offense, then it could not find entrapment as to the second count.

The Court of Appeals for the Second Circuit, in an opinion, affirmed the conviction. The court ruled that the finding by the jury of entrapment as to the earlier bribe did not preclude re-

examination of petitioner's state of mind prior to the second bribe, stating:

> [l]imiting examination of defendant's state of mind to the period prior to any governmental contact ignores the possibility that the defendant could become predisposed to commit the crime after the government's first contact.

791 F.2d at 264 (11a). The Second Circuit, citing the opinion in *United States v. North*, 746 F.2d 627, 630 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1773 (1985), then stated that, in a case involving multiple criminal acts, the later acts might have been committed regardless of the original inducement. 791 F.2d at 264 (11a). Both the Second Circuit in this case and the Ninth Circuit in *North* characterized this issue as one of first impression. 791 F.2d at 264 (10a); 746 F.2d at 629-30.

The Second Circuit stated that "[w]hether an initial entrapment extends through a series of crimes is . . . not a question of law, but a question of fact for the jury." 791 F.2d at 264-265 (11a). Nevertheless, it approved the district court's refusal to charge the jury in accord with petitioner's request that the government must prove beyond a reasonable doubt that the latter crime was not the product of the initial entrapment. Instead, the circuit court held that the district court's "initial and supplemental instructions, viewed in their entirety, adequately conveyed the requirements for a finding of entrapment." 791 F.2d at 265 (13a).[4]

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4. The district court's initial instruction appears at footnote 2, 791 F.2d at 265 (5a-7a). The supplemental instructions, given in response to the jury's requests, appears in the text at 791 F.2d 263-64 (7a-10a).

REASONS FOR GRANTING THE WRIT

THE HOLDING OF THE SECOND CIRCUIT IMPROPERLY PERMITS CONSIDERATION OF THE ELEMENT OF PREDISPOSITION AT A TIME SUBSEQUENT TO ENTRAPMENT OF A DEFENDANT CONTRARY TO SUPREME COURT PRECEDENT.

The decision of the Second Circuit runs counter to this Court's rulings applying the entrapment defense. In the seminal case of *Sorrells v. United States,* 287 U.S. 435 (1932), this Court defined entrapment as occurring:

> when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense.

Id. at 442. The entrapment defense, therefore, is comprised of two essential elements: an objective one — inducement by a government agent, and a subjective one — lack of criminal predisposition on the part of the defendant. As the law of entrapment has developed, however, the central focus of the defense has become the predisposition of a defendant to commit the crime prior to the criminal importunings of the government agent. *Hampton v. United States,* 425 U.S. 484 (1976); *Russell v. United States,* 411 U.S. 423 (1973). Thus, where a defendant is predisposed to commit the crime prior to the inducement of the government agent, the defense of entrapment is almost never available, no matter how outrageous the conduct of the government. *Hampton,* 425 U.S. at 488.

In *Sherman v. United States,* 356 U.S. 369 (1958), this Court considered the entrapment defense in a case involving multiple criminal acts committed by a single defendant. Following the

importunings of a government informer, the defendant sold narcotics to the informer on repeated occasions. After several such sales, the informer notified government agents of the transactions. The government agents subsequently observed three narcotics sales for which the defendant was eventually convicted. *Id.* at 371.

The *Sherman* Court first addressed the element of governmental inducement in the context of multiple criminal acts. The Court held that the governmental inducement was to be judged prior to the commission of the first offense. Thus, the Court stated:

> It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement.

Id. at 374.

Similarly, the Court considered the element of predisposition from the time of the original inducement by the government agent. In rejecting the government's assertion that Sherman's prior record was evidence of predisposition, the Court stated that the prior convictions were "insufficient to prove petitioner had a readiness to sell narcotics at the time [the informer] approached him . . ." *Id.* at 375.

The holding in *Sherman,* therefore, requires that in cases involving multiple criminal acts as part of a course of conduct the elements of entrapment must be judged from a single point in time. Just as the initial inducement applies to each of the resulting acts, so the absence of predisposition prior to that inducement constitutes a valid defense to each of the related acts. Thus, as in *Sherman*, where each criminal act was part of a

continuing course of conduct, a defendant's lack of criminal disposition prior to the original intervention of the government agent precludes a conviction for any such act.

In accord with the holding in *Sherman*, the circuit courts of appeal, in cases involving single criminal acts, have uniformly held that predisposition must be determined prior to the intervention by the government agent. *See United States v. Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985) (predisposition to be assessed prior to contact with government agent); *United States v. Kaminski*, 703 F.2d 1004, 1008 (7th Cir. 1983) ("one is either predisposed to commit a crime before coming into contact with the government agent or one is not . . ."). *See also United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984). The holding in *Sherman* requires the same method of analysis in cases involving multiple criminal acts.

In this case, the jury's acceptance of the entrapment defense as to the first bribe necessarily constituted a finding that petitioner lacked the predisposition to commit the crime prior to the original government inducement. In considering whether this finding precluded a conviction for the later act, the Second Circuit characterized the issue — as had the Ninth Circuit in *North*, — as one of first impression. 791 F.2d at 284, (10a); 746 F.2d 629-30. This issue, however, was resolved by this Court's holding in *Sherman* — a holding which was not addressed by either circuit court.

Clearly, the holdings of the Second and Ninth Circuits, which disregard the effect on predisposition of the original inducement and permit the fact-finder to focus on a defendant's state of mind after the government's suggestion of criminality, are erroneous under *Sherman*. Under the standard applied by this Court in *Sherman* requiring that predisposition be judged prior to the initial government inducement, a defendant's initial lack of criminal

predisposition should preclude a conviction for a subsequent related criminal act. The failure of the Second and Ninth Circuits to follow this Court's holding in *Sherman* underscores the importance of granting the instant petition.

An innocent individual should not be punished for an alteration in disposition after entrapment by the government. Indeed, a contrary rule practically would result in the elimination of the entrapment defense in almost all cases involving improper government conduct and multiple criminal acts. Having altered a defendant's disposition, the government could simply afford a now criminally disposed defendant an opportunity for a second criminal act without concern that its earlier improprieties would preclude a conviction for that act. Such a rule would encourage unscrupulous and overzealous law enforcement agents to induce multiple acts of criminality in otherwise law-abiding citizens, and thereby eviscerate the protection of the citizenry afforded by the entrapment defense, and, further, would violate the *Sherman* Court's pronouncement that the proper function of law enforcement "does not include the manufacturing of crime." Thus, the granting of the petition on this issue is justified.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A—JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES of America,

Appellee,

v.

Victor KHUBANI,

Defendant-Appellant.

No. 797, Docket 85-1408.

United States Court of Appeals,
Second Circuit.

Argued Feb. 13, 1986.

Decided May 27, 1986.

Defendant was convicted in the United States District Court for the Southern District of New York, Robert L. Carter, J., of bribery and he appealed. The Court of Appeals, Lumbard, Circuit Judge, held that acquittal on grounds of entrapment with respect to one charge does not preclude finding that defendant is predisposed to commit a subsequent act of bribery.

Affirmed.

Robert Gage, Asst. U.S. Atty. (Rudolph W. Giuliani, U.S. Atty., S.D.N.Y., Kenneth Roth, Asst. U.S. Atty., New York City, of counsel), for appellee.

Appendix A

Frederick P. Hafetz, New York City (Goldman & Hafetz, New York City, Lawrence S. Goldman, Jay K. Goldberg, of counsel), for defendant-appellant.

Before LUMBARD, PIERCE and ALTIMARI, Circuit Judges.

LUMBARD, Circuit Judge:

Victor Khubani, appeals from a judgment entered on November 4, 1985, in the District Court for the Southern District after a six-day jury trial before Robert L. Carter, *Judge,* convicting him of one count of bribery in violation of 18 U.S.C. § 201(b). Khubani was sentenced to two years' imprisonment, with all but four months of his period of confinement to be served in a half-way house. Judge Carter also imposed a $20,000 fine and a one-year term of probation, during which time Khubani is to perform 250 hours of community service. Khubani asks that his conviction be reversed arguing that Judge Carter improperly instructed the jury on entrapment. We affirm.

In the spring of 1983, Richard Warren, an Internal Revenue Service ("IRS") field auditor, was assigned to conduct an audit of the Tandoor Restaurant, located in New York City at 40 East 49th Street and owned by Ranju Bhawnani and appellant Khubani. On October 11, 1983, Warren notified Khubani by telephone that the audit was being expanded to include audits of the personal income tax returns of Khubani and Bhawnani for the years 1980, 1981, and 1982. Warren asked Khubani to arrange a meeting between Warren and Khubani's accountant. Warren testified at trial that Khubani asked if Warren would first come to Khubani's office at Azad International, an electronics importing firm owned by Khubani, before Khubani spoke to his accountant. Warren

agreed and a meeting was arranged for October 18, 1983. Khubani testified at trial that during the October 11, 1983 telephone conversation he and Warren arranged a meeting for October 18, 1983, but that, contrary to Warren's testimony, Khubani did not mention a private meeting and, in fact, he specifically told Warren that he wanted his accountant to be there.

After this conversation, Warren reported to his supervisor that he believed "Khubani was making a bribe overture." Warren then conferred with the Inspection Division ("Inspection"), the IRS's internal security division, and was told not to accept any bribe offer but to stall Khubani, indicate that whatever was being offered would be picked up at a later time, and report back to Inspection immediately.

Warren testified that, at the October 18, 1983 meeting, Khubani asked Warren to forget about the personal audit and Warren refused. Khubani responded by offering to "take care" of Warren and then pointed to various items of electronic equipment. Warren did not take anything, explaining that he did not want people to see him carrying large boxes out of Khubani's office. He left saying he would be back in the late afternoon. Khubani testified that Warren arrived late at the October 18, 1983 meeting, approximately five or ten minutes after Khubani's accountant had left, and that it was Warren who solicited the bribe.

Warren immediately reported the incident to Inspection which instructed him to pose as a corrupt IRS agent. Warren then placed a recorded telephone call to Khubani in which they discussed Warren's difficulty with being seen carrying boxes out of Khubani's office. The two agreed to meet again on October 21, 1983 to discuss the matter further.

Appendix A

At the October 21, 1983 meeting at Azad International, Warren wore a concealed recording device. Khubani renewed his offer to Warren of electronic goods if Warren would forget about the audit. Warren, however,reiterated his concern with being seen leaving Khubani's office with large boxes and refused to accept the merchandise. Khubani inquired as to what he could do and Warren responded that it was up to Khubani. Khubani then suggested, "Suppose I open my wallet?" Khubani gave Warren $400 and some electronic items and Warren agreed not to audit Khubani's 1980, 1981, and 1982 personal income tax returns.

Although Warren had ostensibly agreed not to audit Khubani, he continued to pursue the other audits. Warren telephoned Bhawnani on November 7, 1983, and arranged a meeting for November 15, 1983, to begin the audit of Bhawnani's personal returns. On November 10, 1983, Bhawnani called Warren and asked him to speak with Khubani regarding the audit of Bhawnani's returns. In a conversation recorded that same day, Khubani asked Warren whether there was any way Warren could help out Bhawnani. Khubani continued, "One hand washes the other, right?" They then agreed to meet at Azad International on November 14, 1983.

At the recorded November 14, 1983 meeting, Khubani asked Warren (1) to dispense with the audit of Bhawnani; (2) to dispense with the audit of the Tandoor Restaurant; and (3) to issue a false "no change" report on Khubani's personal returns. The "no change" report Khubani sought for himself is more favorable than no audit because it indicates that an audit was in fact conducted and everything on the return was determined to be accurate. Most significantly, once a "no change" report is issued, the return is normally never audited again while a return that is simply not audited may be reviewed later. Khubani gave Warren

Appendix A

$700 in cash and Warren agreed to Khubani's three requests.

On November 23, 1983, Warren met with Bhawnani at the Tandoor Restaurant. During the recorded conversation, Bhawnani stated that he had paid $200 of the $700 November 14, 1983 bribe. Warren indicated that more was necessary for him to forget the audit of Bhawnani's personal returns and Bhawnani gave Warren an additional $200.

On July 23, 1985, a four-count superseding indictment was filed[1] charging: (1) Khubani and Bhawnani with conspiracy to defraud the United States Government and to bribe an IRS agent (count 1); (2) Khubani with the October 21, 1983 bribe of $400 (count 2); (3) Khubani and Bhawnani with the November 14, 1983 bribe of $700 (count 3); and (4) Bhawnani with the November 23, 1983 bribe of $200 (count 4).

The trial of both defendants began on July 26, 1985. At the end of the Government's case, Judge Carter dismissed Count One, the conspiracy count. The remaining three substantive counts were submitted to the jury on August 2, 1985.

Khubani and Bhawnani asserted the defense of entrapment. Judge Carter charged the jury on entrapment,[2] but did not give

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1. The original indictment, differing only slightly from the superseding indictment and charging the same counts, had been filed on May 31, 1985.

2. Judge Carter initially instructed the jury on entrapment as follows:

> Now, the defendant, both defendants, assert as a defense that they were the victims of entrapment by an agent of the government.

(Cont'd)

Appendix A

Khubani's requested charge on this issue which stated that if

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(Cont'd)

> The word entrapment that I have just used is a legal term. It has a technical meaning, not that of popular speech or colloquial ordinary usage. Therefore, I must explain the word and meaning of the entrapment as it is used in the law.
>
> The function of law enforcement is not only the prevention of crime but also the detection and apprehension of criminals. Manifestly, the function does not include the manufacturing of crime. The defense of entrapment is based upon the policy of the law not to ensnare or entrap innocent persons into the commission of a crime. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal.
>
> A basic feature of entrapment is that the idea or design of committing the crime originated with the law enforcement officer rather than with the defendant; that the defendant has no previous disposition, intent or purpose to commit the alleged offenses and that the law enforcement officer or government employee implanted in the mind of an innocent person the disposition to commit the alleged offense and instigated and incited its commission in order that the defendant might be arrested and prosecuted.
>
> If you find that an agent or employee of the government merely afforded a favorable opportunity or facilities to the defendant for the commission of the alleged crime, such conduct on the part of the government does not constitute entrapment. Entrapment would occur only if you find that the government agents induced the defendant to commit the crimes charged in the indictment and that the criminal conduct of the defendant was a product of government activity.
>
> If you find any credible evidence creating the reasonable

(Cont'd)

entrapment were found as to the October 21, 1983 bribe (count 2), then the Government must prove beyond a reasonable doubt that the November 14, 1983 bribe (count 3) was not the result of the first entrapment.

After two hours of deliberations, the jury sent the court a note which read "[i]f we find Kubani [sic] not guilty because of entrapment on Count #2, do we have to find him not guilty on Count #3?" After discussing the matter with the attorneys, Judge Carter responded to the note as follows:

> I think I tried to explain to you in my charge that you have to consider each count separately and if you deal with count 2 then you go into count 3 and you consider the facts and the circumstances

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(Cont'd)

> possibility that a government agent or employee instigated and incited or otherwise induced the defendant to commit the crimes charged, then the government must prove beyond a reasonable doubt that such inducement was not the cause or creator of the crime, that is, that the defendant had been predisposed and willing to commit the crime in the first place.
>
> If the prosecution has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offense charged, but was awaiting a favorable opportunity to commit the offense, then you may find that the inducement, if any, which brought about the actual offense was no more than providing what appeared to the defendant to be a favorable or timely or convenient opening or facility for the criminal activity in which that defendant may have preferred to engage and in such circumstances you may find that the government agent has not seduced an innocent person or persons but has only provided the means for the defendant to effectuate or realized [sic] his own then existing purpose.

> that you regard were relevant to that count and then make your determination. They have to be dealt [with] in that way.

After this response, a side bar conference was held in which Khubani's counsel stated that he did not believe the supplemental instruction fully apprised the jury "that they can consider all of the evidence in the case. . . I think it connotes that they are limited to an examination of the circumstances surrounding the date of November 14." Accordingly, Khubani's counsel asked if it would "be possible to amplify it to let them know they can consider all evidence?" Judge Carter then instructed the jury:

> I want you to understand when I said that you can consider the evidence—that they are separate counts—and you consider the evidence relevant—if you reach a conclusion on one count, consider the evidence relevant to the next count. You start separately. What I meant was that you consider all of the evidence that you regard as being relevant and you consider all the evidence that you regard as being relevant when you consider any count to the indictment.

Before the jury continued its deliberations, the court responded to other jury notes and received a not guilty verdict as to Bhawnani on Counts Three and Four.

Later that same day, the jury requested to hear the definition of entrapment and Judge Carter reread his initial charge on the subject. Thereafter, the jury sent a note that indicated it was deadlocked on the counts against Khubani and Judge Carter delivered a modified *Allen* charge. At 6:35 p.m., a not guilty verdict was returned as to Khubani on Count Two.

Appendix A

Jury deliberations resumed the following Monday, August 5, 1983. At noontime, the court received a note in which the jury asked two questions: (1) "[i]f the defendant had predisposition on November 14, does that preclude defense of entrapment?" and (2) "[d]oes the phrase 'create the facility' permit a government agent to suggest that a bribe be given?"

With regard to the first question, Khubani's counsel stated:

> Your Honor, our position is . . . that the predisposition, as your Honor charged it, refers to the defendant's state of mind prior to the time he interacted with the agent, and it is based on his disposition prior to any meeting.
>
> Indeed, the word predispositioned [sic], prefix "pre", means before he meets with the agent, so I differ strenuously with [Assistant United States Attorney] Gage's view, and I think the jury has to consider everything that occurred prior to November 14.

Just before the judge charged the jury in response to the note, Khubani's counsel reasserted his position:

> Your Honor, I would ask that you tell the jury that they must consider all the actions of the agents in the totality of the case and not deal with November 14 in a vacuum.

Judge Carter then responded to the jury's first question as follows:

> If you find, based upon an evaluation of all

> the evidence, that there was [a predisposition on November 14], of course, it precludes the defense of entrapment. The issue of whether you find the predisposition, you have to look at all the evidence.

Thereafter, Judge Carter addressed the jury's second question regarding the phrase "create the facility." The court charged, in substance, that the jury should consider (1) whether, based on the totality of the circumstances, Warren induced Khubani to commit the crime charged, and (2) if the answer to (1) is yes, whether the government has proven beyond a reasonable doubt that this "inducement was not the cause that created the crime" but that "the defendant had been predisposed and willing to commit the crime." Khubani's counsel noted an exception to the court's response to the first question. Shortly after this supplemental charge, the jury found Khubani guilty on Count Three.

The principal issue presented for the first time in this circuit is whether a finding of entrapment as to one of the crimes charged in an indictment precludes a finding of guilt as to similar subsequent crimes also charged. Khubani relies heavily on this court's decision in *United States v. Williams,* 705 F.2d 603 (2d Cir.), *cert. denied,* 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983), to support his position that the Count Two (October 21 bribe) acquittal requires reversal of the Count Three (November 14 bribe) conviction. *Williams* involved an appeal from an Abscam conviction wherein the district court had charged the jury to consider the defendant's predisposition at the time of the commission of the crime. We held this charge to be erroneous, though harmless, and gave the following instructions concerning predisposition:

Appendix A

> A defendant's predisposition is not to be assessed "as of the time when he committed the crime." Normally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime.

Williams, 705 F.2d at 618. Essentially, Khubani now argues that *Williams* teaches that predisposition should only be measured prior to any governmental suggestion. Assuming this to be true, Khubani contends that because the jury found entrapment—and therfore necessarily found no predisposition—as to the October 21 bribe, it is not possible, as a matter of law, to convict him—and thereby implicitly find predisposition—as to the November 14 bribe. Common sense persuades us that this is too broad an interpretation of the *Williams* case. Limiting examination of defendant's state of mind to the period prior to any governmental contact ignores the possibility that the defendant could become predisposed to commit the crime after the government's first contact. A defendant "might well have found [his crime] so profitable and easy that he thereafter willingly continued it, regardless of [the] original inducement." *United States v. North,* 746 F.2d 627, 630 (9th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1773, 84 L.Ed.2d 832 (1985). We agree with the Ninth Circuit's view that an initial entrapment does not "immunize [one] from criminal liability for subsequent transactions that he readily and willingly undertook." *Id.* Whether an initial entrapment extends through a series of crimes is, therefore, not a question of law, but a question of fact for the jury. Of course the jury should be instructed in cases such as this that they must find as to each alleged offense whether the defendant is guilty beyond a reasonable doubt. We believe, from consideration of the entire charge and supplemental charge, that the jury was so advised.

Appendix A

Khubani argues that even if there is a fact issue as to the second entrapment, Judge Carter's supplemental instructions prevented the jury from considering Khubani's state of mind before Warren first suggested criminal activity and instead centered the jury's attention regarding predisposition on the time of the crime, November 14, in violation of *Williams*. We disagree. Judge Carter repeatedly emphasized that "all the evidence" must be considered when determining defendant's predisposition. "All the evidence" clearly includes evidence of defendant's predisposition prior to Warren's initial suggestion of criminal activity. Moreover, the jury had already demonstrated that it was focusing on defendant's predisposition prior to any governmental suggestion of criminal conduct when it sent the court the note which read "[i]f we find Kubani [sic] not guilty because of entrapment on Count #2, do we have to find him not guilty again on Count #3?" There also, Judge Carter stated simply that, as to Count Three, the jury should "consider the facts and the circumstances that you regard were relevant to that count. . ." Judge Carter's instructions did not in any way preclude consideration of defendant's state of mind before the October 21 bribe and the fact that the jury had already concluded that defendant had no predisposition to commit bribery in October, 1983. Indeed, if anything, the supplemental instructions invited consideration of Khubani's state of mind before October 21.

Although this court stated in *Williams* "[n]ormally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime," 705 F.2d at 618, the qualifying word "normally" indicates that this rule is not applicable to all situations. *Williams* did not involve the situation presented herein where the predisposition to criminal activity did not exist before the first encounter with government agents but where it may have arisen

thereafter. *Williams* involved an individual who was predisposed to commit the crime before any contact with government agents and, therefore, the court did not consider the possibility that, although one might not be initially predisposed to commit a crime, he might at some later time become predisposed. Accordingly, *Williams* is not controlling.

Finally, we note that Judge Carter's supplemental instructions complied with defense counsel's contemporaneous request that the jury be told "that they can consider all of the evidence in the case . . . [and] that they must consider all the actions of the agents in the totality of the case and not deal with November 14 in a vacuum." Although Judge Carter did not give Khubani's original requested charge that a finding of entrapment as to the October 21 bribe required proof beyond a reasonable doubt that the November 14 bribe was not the result of the initial entrapment, Judge Carter's initial and supplemental instructions, viewed in their entirety, adequately conveyed the requirements for a finding of entrapment.

Judgment affirmed.

APPENDIX B—DEFENDANT KHUBANI'S REQUEST TO CHARGE NO. 2

DEFENDANT KHUBANI'S REQUEST TO CHARGE

NO. 2

ENTRAPMENT

You have heard evidence that on October 21, 1983 Victor Khubani gave radios and $400 in cash to I.R.S. Agent Warren. You have also heard that on November 14, 1983 Mr. Khubani gave Agent Warren an additional $700. If you find that the giving of the $400 and the radios on October 21 was the result of entrapment then the government must prove to you beyond a reasonable doubt that the subsequent payment of $700 was not the result of the initial entrapment.

granted _____
denied _____
modified _____